

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

In re,

Dwight E. Funderburk,

Debtor(s).

John K. Fort, Trustee,

Plaintiff(s),

v.

The Taylor Firm of Taxation, a South Carolina
Professional Association,

Defendant(s).

C/A No. 12-04785-HB

Adv. Pro. No. 13-80098-HB

Chapter 7

**ORDER ON MOTIONS FOR
SUMMARY JUDGMENT**

THIS MATTER came before the Court for hearing pursuant to the Motions for Summary Judgment filed on behalf of Chapter 7 Trustee John K. Fort (“Plaintiff”) and Defendant, The Taylor firm of Taxation, a South Carolina Professional Association (“Defendant”). Each party asks that the Court enter judgment on certain causes of action.

FACTS

1. An involuntary petition under Chapter 7 of the Bankruptcy Code was filed on August 3, 2012 against Dwight E. Funderburk.
2. An Order of Relief was entered on September 14, 2012 requiring Funderburk to file schedules and statements within seven (7) days.
3. Funderburk did not file his schedules and statements until March 18, 2013. The schedules and statements indicate the following:
 - a. An asset consisting of a checking account with First Citizens Bank with a value of \$6,081.82 as of the date of the petition;

- b. An interest in a private annuity with a current value designated as “unknown”;
 - c. Gross wages, salary and commissions of \$0.00. However, income was listed on Schedule I as \$1,804.00 per month from social security and \$19,250.00 from “annuity”, with a notation that “Debtor receives a yearly disbursement of an annuity in the amount of \$231,000.00.”
- 4. Funderburk’s bank statements indicate that the sum of \$230,999.97 was deposited into his First Citizens checking account on September 25, 2012, increasing the current balance in that account significantly. The beginning balance on September 1, 2012 was \$2,434.44, the above amount was the only deposit, debits are indicated in the amount of \$121,925.00, and the ending balance on September 30, 2012 was \$111,509.41.
 - 5. The record includes a check drawn on that account from Funderburk in favor of Taylor & Associates dated September 25, 2012, in the amount of \$50,000.00.
 - 6. The record includes a check from Funderburk to Taylor & Associates dated October 10, 2012 for \$2,000.00.
 - 7. The record includes a check from Funderburk to Taylor & Associates dated October 11, 2012 for \$8,000.00.
 - 8. Defendant acknowledges receipt of the funds for payment of professional services rendered or to be rendered and/or associated expenses.
 - 9. There is no dispute that the source of the funds in the First Citizens account was a distribution from the annuity that Funderburk disclosed in his schedules.
 - 10. There is no dispute that the payments to Defendant in the amount of \$60,000.00 occurred post-petition.

11. There is no evidence in the record to indicate that the annuity and the payment received therefrom was anything other than property of the bankruptcy estate, as Funderburk's interest in the annuity was disclosed as an asset existing on the petition date and at the date of the Order for Relief.
12. Plaintiff's complaint alleged that the Court has jurisdiction over this proceeding and the parties hereto and venue is proper. Defendants admitted these allegations. Plaintiff also alleged that the adversary presents core proceedings pursuant to 28 U.S.C. § 157. Defendant denied these allegations in the Answer and amended Answer; however Defendant later filed a pleading stating that "This matter is a core proceeding . . . Defendant does not believe that the case of Stern v. Marshall presents any challenges to entry of a final order of judgment," thereby consenting to entry of a final order by this Court.¹ Plaintiff consented to entry of a final order by this Court and filed a pleading indicating that he was not aware of any challenges that may be presented by Stern v. Marshall.²

MOTIONS FOR SUMMARY JUDGMENT

Defendants asks the Court to grant summary judgment in their favor on Plaintiff's first and second causes of action pursuant to 11 U.S.C. §§ 547 and 548, because the facts here present a post-petition transfer and those causes of action require transfers pre-petition. At the hearing, Plaintiff agreed that these causes of action are no longer viable and therefore, summary judgment will be granted.

Plaintiff asks the Court to enter judgment in his favor against Defendant on the remaining cause of action based on 11 U.S.C. § 549. That section provides "the trustee may avoid a transfer

¹ Doc. No. 29.

² Doc. No. 18.

of property of the estate—(1) that occurs after the commencement of the case; and . . . (2)(B) that is not authorized under this title or by the court.

Summary Judgment Standard

Fed. R. Civ. P. 56(c), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7056, provides that summary judgment “should be rendered if the pleadings, the discovery and disclosure of materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). “The judge is not to weigh the evidence, but rather to determine if there is a genuine issue of fact for trial.” *McCoy v. Lewis*, 2010 WL 3169431, 3 (D.S.C. 2010) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphasis original).

“The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view the evidence before it and the inferences to be drawn therefrom in the light most favorable to the non-moving party.” *Sain v. HSBC Mortg. Services, Inc.*, 2010 WL 2902741, 2 (D.S.C. 2010). The nonmovant cannot “rest upon mere allegations or denials of his pleading, but ‘must come forward with specific facts showing that there is a genuine issue for trial.’” *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–88 (1986)). “[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-

moving party, disposition by summary judgment is appropriate.” *Teamsters Joint Council No. 83 v. Centra Inc.*, 947 F.2d 115, 119 (4th Cir. 1991).

Analysis

The parties agree that this was a post-petition, post-Order of Relief transfer of property from Funderburk to Defendant. The record clearly indicates that the funds for the \$60,000.00 in transfers originated from the deposit of annuity funds into the First Citizen’s account. However, Defendant asserts that Plaintiff has not shown that this transfer was made from property of the estate.³

The record provides ample evidence for the Court to conclude that the funds in the First Citizens account were property of the estate, and no evidence to the contrary. Funderburk’s interest in the annuity was listed on his bankruptcy schedules as an estate asset. He disclosed that he receives payment from the account in the amount of the deposit. There were insufficient funds in the account before that deposit to make these transfers, so the deposit of these funds was the source for the transfers. Therefore, no dispute of fact exists. Section 541 includes within property of the estate “all legal or equitable interests of the debtor in property as of the commencement of the case.” This definition includes a debtor’s receivables and interests in accounts. There is no evidence before the Court indicating that these assets are outside the property of this estate. Further, “[a]ny entity asserting the validity of a transfer under § 549 has the burden of proof on the issue of the validity of the transfer. Fed. R. Bankr. P. 6001. No proof has been offered by Defendant.

³Defendants’ pleadings also discuss how the payments were applied (to pre- or post-petition obligations) and the purpose of the payments (professional fees). However no proof is offered from which the Court could find that the payments were authorized by the code or the Court.

There is no dispute of fact that Defendants received \$60,000.00 in funds from Funderburk transferred after the commencement of the case and the Order for Relief from estate funds and the transfers were not authorized by the Bankruptcy Code or the Court.

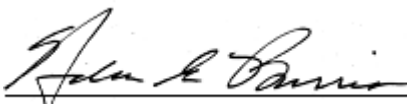
IT IS THEREFORE, ORDERED:

1. That the Motion for Summary Judgment filed by Defendant The Taylor Firm of Taxation is hereby granted as to the first and second causes of action asserted under 11 U.S.C. §§ 547 and 548 and judgment will be entered in favor of Defendants; and
2. That the Motion for Summary Judgment filed by Plaintiff John K. Fort, Trustee, is hereby granted as to Plaintiff's third cause of action and the Court will enter judgment in favor of Plaintiff against Defendant The Taylor Firm of Taxation on claims under 11 U.S.C. § 549.

**FILED BY THE COURT
08/08/2014**



Entered: 08/08/2014


US Bankruptcy Judge
District of South Carolina